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10/577,850	05/24/2007	**Fabien Poulard**	Q94564	4893

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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/577,850
Filing Date: May 24, 2007
Appellant(s): POULARD, FABIEN

Raja N. Saliba
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 6/28/10 appealing from the Office action mailed 3/17/10.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

NEW GROUND(S) OF REJECTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 1 is rejected under 35 U.S.C. 102(b) as being anticipated by Tomaka (6,651,844).

Regarding claim 1, Tomaka discloses a fluid product nasal atomizing and spraying device (10) comprising a pump that operates without piezoelectric, electrostatic spraying mechanisms or propellant gas (column 3, lines 17-18), a spray head (20) (fig. 2) to actuate the pump manually (column 3, lines 27-28), and a dispensing detection means (fig. 11) to detect that a product does has been dispensed. The detection means (fig. 11), which is connected to electronic means (52) to process the signal, comprises an expulsion detector (40) that outputs a signal to inform the user that a dose has been dispensed through an expulsion channel of the spraying device (column 5, lines 8-12).

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,651,844	Tomaka	11-2003
6,138,669	Rocci	10-2000

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

2. Claims 2, 4, 5, and 7-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tomaka (6,651,844) in view of Rocci (6,138,669).

3. Regarding claims 2, 5, and 7-11, Tomaka discloses a fluid product nasal atomizing and spraying device (10) comprising a pump that operates without piezoelectric, electrostatic spraying mechanisms or propellant gas (column 3, lines 17-18), a spray head (20) (fig. 2) to actuate the pump manually (column 3, lines 27-28), and a dispensing detection means (40) to detect that a product does has been dispensed. The detection means (40), which is connected to electronic means (52) to process the signal, outputs a signal to inform the user that a dose has been dispensed by the pump (column 5, lines 8-12). Tomaka further discloses the pump being connected to a spraying orifice (16a) through an expulsion channel (16) (fig, 2), but does not disclose the detection means being provided in the expulsion channel. Rocci teaches a dose counter for a nasal device (column 3, lines 44-50) with a detection means in the form of a pressure sensor (12) provided in an expulsion channel (7) (fig. 3) and adapted to detect the passage of a product in the expulsion chamber due to a pressure difference at the time that a product dose is sprayed (column 5, lines 118). Therefore it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the nasal spray device of Tomaka with a detection means provided in an expulsion chamber as taught by Rocci in order to provide the advantage of fewer miscounts, as taught by Rocci (column 2, lines 44-47).

(10) Response to Argument

Appellant's argument that the sensor found is Rocci is specifically designed for a MDI device and would not operate in the device of Tomaka because of insufficient pressure is not persuasive because of the specific sensor disclosed by Rocci being a NPC-109 manufactured by Lucas NovaSensor (coulumn 5, lines 25-26). This sensor is in the same 100 series of sensors as a sensor specified for use in the device of the appellant, the NPC-100 also manufactured by Lucas NovaSensor. Since the appellant admitted the prior art of the functionality of this type of sensor working with the pressures associated with a manual pump their argument is no persuasive.

Appellant's argument that the rationale of providing the nasal spray device of Tamaka with a detection means provided in an expulsion chamber as taught by Roccie in order to provide the advantage of few miscounts as taught by Rocci (column 2, lines 44-47) does not take into account that the device of Tomaka already includes a mechanism for ensuring miscounts is not persuasive because the detection means of Rocci would be an improvement to the device of Tomaka since the device of Rocci would not miscount is the pump was depressed when the medicament reservoir was empty.

Appellant's argument that one skilled in the art looking for a system informing the user that the dose of product has actually been dispensed from a pump operating without propellant gas would not look into the device Rocci to find a solution because it is exclusively limited to an MDI system containing propellant in a pressurized canister is not persuasive because pump actuated spray devices and metered doses inhalers

(MDIs) have very similar operating methods and operating outcomes. The methods and outcomes of both pumps and MDIs are that a user depresses an actuator which initiates the release of a medicament in a nebulized form to be inhaled. Therefore it is within ordinary skill in the art to consider features of both pump actuated and pre-pressurized devices to be analogous to each other.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

This examiner's answer contains a new ground of rejection set forth in section **(9)** above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) **Reopen prosecution.** Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be relevant to the new grounds of rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

(2) **Maintain appeal.** Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the

other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).

Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.

Respectfully submitted,

/Christopher Blizzard/

Examiner, Art Unit 3771

A Technology Center Director or designee must personally approve the new ground(s) of rejection set forth in section (9) above by signing below:

/DONALD T HAJEC/

Director, Technology Center 3700

Conferees:

/Justine R Yu/
Supervisory Patent Examiner, Art Unit 3771

/Boyer D. Ashley/
Supervisory Patent Examiner, Art Unit 3724